Filed 4/5/04 P. v. Moreno CA5

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

ALBERT MORENO,

Defendant and Appellant.

F042185

(Super. Ct. No. SC084379)

OPINION

APPEAL from a judgment of the Superior Court of Kern County. Richard J. Oberholzer, Judge.

David Y. Stanley, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Mary Jo Graves, Assistant Attorney General, Lloyd G. Carter and Brian Alvarez, Deputy Attorneys General, for Plaintiff and Respondent.

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Albert Moreno (appellant) shot Juan Gonzales five times at close range with a 12 gauge shotgun after the two drank alcohol together in appellant's garage. Appellant was found guilty of first degree murder (Pen. Code § 187, subd. (a)),[1] and of being a felon in

[1]All further statutory references are to the Penal Code unless otherwise stated.

possession of a firearm (§ 12021, subd. (a)(1)). It was found true that he had previously been convicted of four prior strikes (§§ 667, subds. (c)-(j), 1170.12, subds. (a)-(e)); four serious felonies (§ 667, subd. (a)); and four prior prison terms (§ 667.5, subd. (b)). Appellant was sentenced to a term of 100 years to life plus 12 years in state prison.

Appellant contends the trial court erred when it denied his *Wheeler/Batson*[2] motion. We disagree and affirm the conviction.

DISCUSSION

APPELLANT'S *WHEELER* MOTION

Appellant is Hispanic. During jury selection, after the prosecutor exercised his final peremptory challenge to excuse prospective juror Ms. 40,[3] appellant made a *Wheeler/Batson* motion, claiming Hispanics had been systematically excluded from the jury by the prosecutor. The court denied the motion, finding appellant had not made a prima facie case of discrimination. The record supports that determination.

The record shows that following four peremptory challenges by the prosecutor of non-Hispanic women, the prosecutor used his fifth peremptory challenge to excuse Mr. 56, a Hispanic male. Mr. 56 had lived in Kern County for 60 years and worked for an irrigation company. His wife worked for a collection agency, and he had four children. Mr. 56 stated he had one son who had been in jail because "he stabbed a guy." Mr. 56 had himself been arrested for a bar shooting and had spent time in jail, but "they didn't find nothing on [him]" and his case was subsequently "cleared … up."

Another two peremptory challenges of non-Hispanic venirepersons occurred, and the prosecutor's eighth challenge was to Ms. 02, a married, Hispanic woman who worked in an elementary school cafeteria. Her husband was disabled, due to renal failure, and

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[2] *People v. Wheeler* (1978) 22 Cal.3d 258; *Batson v. Kentucky* (1986) 476 U.S. 79.

[3] The redacted transcripts describe jurors by their nine-digit identification numbers; we simplify by using the final two digits.

had a kidney transplant which was failing. She had five grown children, two of whom were incarcerated in state prison.

The prosecutor exercised his ninth peremptory challenge to excuse Ms. 40, who was Hispanic, divorced with an adult child, and had worked for the postal service for 22 years. She had been arrested for driving under the influence 20 years prior. When the venire panel was asked as a group whether they would consider a witness's felony conviction in weighing the witness's credibility, she was the only juror who stated she would not consider the felony conviction. The court further questioned her and asked:

> "Let me ask you this, Ms. [40]: If you were out on the street and two people came up to you, one upstanding citizen and the other one had a prior felony conviction, tell you two conflicting stories—you're not on the jury, just on the street—would you consider that person has a prior felony conviction in deciding which one is telling the truth?"

Ms. 40 answered "No."

Following this final challenge, defense counsel made a *Wheeler* motion. He argued, "We have had a limited number of Hispanics on this panel, several of which have been challenged by the District Attorney, including [Mr. 56], Ms. [02] …." Counsel continued, stating, "[I]t appears it's a pattern of practice here that there is no independent reason for having challenged Ms. [40]."

In response to defense counsel's argument, the trial court stated, "I'm trying to find the systemic exclusion of jurors, and I don't see that yet." Referring to the prosecutor, the trial court stated, "[H]e may have excluded three [Hispanic] jurors. You [defense counsel] excluded one. There is another one sitting on the jury right now." The court reiterated that defense counsel had not established systematic exclusion. Defense counsel acknowledged that he had the burden of establishing systematic exclusion, but felt he had done so. The court disagreed and denied appellant's *Wheeler* motion.

On appeal, appellant contends the trial court erred in finding he did not make a prima facie case of systematic exclusion of Hispanic jurors, and the judgment should be reversed. We disagree.

The use of peremptory challenges to remove prospective jurors solely on the ground of presumed group bias violates both the state and federal Constitutions. (*Batson v. Kentucky*, *supra*, 476 U.S. at p. 89; *People v. Wheeler*, *supra*, 22 Cal.3d at pp. 276-277.) A defendant asserting an unconstitutional exclusion of members of a cognizable group bears the initial burden of making a prima facie showing that the jurors are being excluded on the basis of group bias. (*People v. Turner* (1994) 8 Cal.4th 137, 164.) To make a prima facie showing, the defendant must (1) make as complete a record of the circumstances as possible; (2) establish that the persons excluded are members of a cognizable group; and (3) from all the circumstances of the case, show a strong likelihood that such persons are being challenged because of their group association rather than any specific bias. (*Ibid.*, citing *People v. Howard* (1992) 1 Cal.4th 1132, 1153-1154.)

A pattern of challenges eliminating most or all of the group may give rise to an inference of discrimination. (*People v. Crittenden* (1994) 9 Cal.4th 83, 115.) However, "A defendant may not simply rely upon exclusion of the group-associated prospective jurors in establishing a 'strong likelihood' of removal because of group bias. [Citation.]" (*People v. Bernard* (1994) 27 Cal.App.4th 458, 466, disapproved on other grounds in *People v. Box* (2000) 23 Cal.4th 1153, 1188, fn. 7.) Rather, the defendant must point out other relevant circumstances, such as the nature of the prosecutor's voir dire, or the similarity of the challenged jurors to the seated jurors based on characteristics other than group membership. (*People v. Buckley* (1997) 53 Cal.App.4th 658, 663; *People v. Superior Court* (*Williams*) (1992) 8 Cal.App.4th 688, 702.)

Where the trial court denies a *Wheeler* motion without finding a prima facie case of group bias, the reviewing court considers the entire record of voir dire for evidence to support the trial court's ruling. """Because *Wheeler* motions call upon trial judges' personal observations, we view their rulings with 'considerable deference' on appeal. [Citations.] If the record 'suggests grounds upon which the prosecutor might reasonably have challenged' the jurors in question, we affirm. [Citation.]""" (*People v. Crittenden*,

supra, 9 Cal.4th at pp. 116-117; accord, *People v. Allen* (1989) 212 Cal.App.3d 306, 312-316 [*Wheeler* motion properly denied where record showed specific bias as ground for each of nine peremptory challenges against Blacks and Hispanics].)

Here, the trial court's finding that appellant failed to make a prima facie case of group bias is supported by the record. The gist of appellant's argument is that the excluded prospective jurors were Hispanic and their answers did not set them apart from other venirepersons. However, the record reveals there were legitimate, race-neutral grounds on which the prosecutor reasonably might have challenged the jurors in question.

Mr. 56 and Ms. 02 both had children who had been or were in jail or prison. This alone could serve as a valid race-neutral reason to excuse them. (See *People v. Cummings* (1993) 4 Cal.4th 1233, 1282 [fact that prospective juror's relative had been convicted of a crime was a proper consideration justifying peremptory challenge]; *People v. Sims* (1993) 5 Cal.4th 405, 430 [same].) In addition, Mr. 56 had been arrested for a bar shooting, and Ms. 40 had been arrested 20 years earlier for driving under the influence. Ms. 02's husband was seriously ill. Factors indicating a difficulty or inability to focus on the evidence may serve to justify a peremptory challenge. (See *Mitchell v. Superior Court* (1984) 155 Cal.App.3d 624, 628.) Ms. 40 was the only prospective juror who stated she would not consider a prior conviction in weighing a witness's credibility. Each of these reasons, individually or in the aggregate, suggest legitimate, race-neutral grounds upon which the prosecutor reasonably might have challenged the prospective jurors.

Appellant failed to demonstrate a "strong likelihood" that the prospective jurors, Mr. 56, Ms. 02 and Ms. 40, were challenged because of their group association rather than because of any specific bias. As the record suggests reasonable grounds on which the prosecutor might have challenged the jurors in question, we sustain the trial court's ruling on review. (*People v. Crittenden*, *supra*, 9 Cal.4th at pp. 116-117.)

DISPOSITION

The judgment is affirmed.

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DAWSON, J.

WE CONCUR:

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CORNELL, Acting P.J.

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GOMES, J.